



**Ettah v Fuzu Services Limited Mauritius Limited (Petition  
75 of 2020) [2022] KEELRC 1549 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1549 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**PETITION 75 OF 2020**  
**MN NDUMA, J**  
**JULY 28, 2022**

**IN THE MATTER OF INTERPRETATION AND ENFORCEMENT OF  
ARTICLES 22(1), 23(3), 25(A), 41(1) & (2), 47, 50(1) AND 258(1) OF  
THE CONSTITUTION**

**AND**

**IN THE MATTER OF CONTRAVENTION OF ARTICLES 22(1), 41(1),  
47, 50(1) AND 258(1) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTION 3(6), 41, 45 AND 87 OF THE  
EMPLOYMENT ACT, 2007**

**AND**

**IN THE MATTER OF SECTION 4 OF THE FAIR ADMINISTRATIVE  
ACTION ACT**

**AND**

**IN THE MATTER OF RULE 7(1) OF THE EMPLOYMENT AND  
LABOUR RELATIONS COURT (PROCEDURE) RULES, 2016**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION  
OF RIGHTS AND FUNDAMENTAL FREEDOMS) AND PROCEDURE  
RULES, 2016**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION  
OF RIGHTS AND FUNDAMENTAL FREEDOMS) AND PROCEDURE**



**RULES, 2013**

**BETWEEN**

**GODFREY ETTAH ..... PETITIONER**

**AND**

**FUZU SERVICES LIMITED MAURITIUS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The petition was filed on 5<sup>th</sup> May, 2020 by the petitioner seeking the following reliefs: -
  - (a) Declaration that the impugned Settlement and Release Agreement is unconstitutional, null and void for being contrary to Articles 22(1), (50(1) and 258(1) of the Constitution by purporting to limit the petitioner's right to institute the instant proceedings.
  - (b) A declaration that the impugned Settlement and Release Agreement is unconstitutional, null and void for being contrary to Article 41(1) of the Constitution as read with Section 3(6) of the Employment Act by purporting to relinquish, vary and amend the minimum terms and conditions to which the Petitioner is entitled pursuant to his employment and following the wrongful and/or unfair termination of such employment by the Respondent.
  - (c) A declaration that the Respondent contravened the petitioner's right to fair labour practice under Article 41(1) of the Constitution as read with Section 41 and 45 of the Employment Act in purporting to place the petitioner under Performance Improvement Plan and/or terminate the petitioner's employment.
  - (d). A declaration that the Respondent contravened the petitioner's right to administrative action which is lawful and procedurally fair under Article 47 of the Constitution as read with Section 4 of the Fair Administrative Action Act by purporting to place the Petitioner under Performance Improvement Plan and/or terminating the petitioner's employment.
  - (e) A declaration that the purported Settlement and Release Agreement amounted to unfair termination and/or wrongful dismissal of the Petitioner.
  - (f). An order for compensation of the petitioner by the Respondent for violation of the Petitioner's rights under Article 41(1) and 47 of the Constitution.
  - (g). An order for payment to the petitioner by the Respondent for damages for wrongful termination equivalent to 12 months based on the gross salary earned at the time of wrongful termination totaling to Kshs 2,160,000.
  - (h). Accrued incentives under the Salary and Incentives Agreement totaling to Kshs 220,500.
  - (i). Costs of this Petition.
  - (j). Any other reliefs the Honourable Court may deem fit, just and expedient to grant.
2. The petitioner was employed by the respondent on 23<sup>rd</sup> April, 2019 as a Business Development Manager at a gross monthly salary of Kshs 150,000 during probation and Kshs 180,000 upon confirmation.



3. In addition, the petitioner was entitled to payment of commission at 10% and 5% for sale of new Fuzu B2B vehicles and renewal of B2B subscription agreements respectively.
4. The respondent did not raise the salary of the petitioner to Kshs 180,000 upon completion of the three months' probation as set out in the contract of employment.
5. That the respondent did not pay commission on sales in the sum of Kshs 220, 500 in breach of the contract.
6. The petitioner was placed on Performance Improvement Plan with effect from 23<sup>rd</sup> December, 2019 upon returning from annual leave without being told the basis of the action since in the performance review done on or about October, 2019, the petitioner had scored 'very good' performance. The petitioner was informed vide email communication that he was to meet the set targets failing which his employment would be terminated on 17<sup>th</sup> January, 2020. The targets set included
  - a. Individual close of sales in the sum of \$15,00
  - b. Maintain healthy pipeline of \$ 30,000
  - c. Convert 20% of the leads brought in for the last 2 Months.
  - d. Identify challenges mitigating his success with the line manager with appropriate suggestions on how to overcome them.
7. These targets were to be met between 19<sup>th</sup> December, 2019 at 5:47 pm to 17<sup>th</sup> January, 2020 at 3:30 p.m. In that period, the petitioner had already been granted annual leave for the period between 23<sup>rd</sup> December, 2019, to 3<sup>rd</sup> January, 2020. That it was impossible to meet set targets within 10 days.
8. That the way the Performance Improvement Plan was set out was unprocedural and not in line with usual practice. That this created a hostile work environment for the petitioner making it impossible for him to attain the set targets. This Performance Improvement Plan was just a pretense to constructively dismiss the petitioner.
9. On 17<sup>th</sup> January, 2020, the petitioner was simply summoned and his employment terminated verbally by Luizer Makena. The petitioner reported to work on 24<sup>th</sup> January, 2020 in absence of a written letter of termination but the petitioner was led out of the premises and told never to return. The petitioner states that the termination was unlawful and unfair and a violation of Article 41 which guarantees every person the right to fair Labour practices; Article 47 which guarantees the petitioner the right to administrative action which is lawful, reasonable and procedurally fair; and Article 50(1) which guarantees the petitioner the right to a fair hearing before any punitive action is taken against him.
10. That the petitioner was not given the reason for termination and a fair procedure was not followed in arriving at the decision to terminate and the petitioner was not given any opportunity to be heard. That he had no previous warnings. That the resultant Settlement and Release Agreement is entirely unlawful and unconscionable as it is excessively one-sided in favour of the respondent to the detriment of the petitioner.
11. That the respondent further violated Sections 41 and 45 of the *Employment Act* and the Agreement is null and void by dint of Section 3(6) of the *Employment Act*, 2007.
12. That the petition be allowed and the petitioner be granted the reliefs sought.



## Replying Affidavit

13. The respondent filed a replying affidavit sworn to by Nelly Mutula, the Human Resource Director of the respondent. The deponent raises preliminary objection to the suit in that it had retained services of Messrs CMs Daly and Inamdar to negotiate in good faith between parties and settled the dispute out of Court. That out of Court settlement is founded on Article 159 of the Constitution of Kenya under which Alternative Dispute Resolution is encouraged.
14. That the petitioner also retained counsel for the purpose of negotiation which was done in good faith and in arm's length.
15. That to the delight of all parties, a resolution was promptly reached leading to the execution of a settlement and release agreement on 30<sup>th</sup> January, 2020. That the said agreement was reached within 8 days of the date of the demand letter and same was executive by both parties in the presence of Mr. Steve Opar of Messrs Odhiambo Opar & Co. Advocates, representing the petitioner, and Mr. Mee Odho Samson Oduol of Messrs. Daily and Inamdar Advocates representing the Respondent.
16. The Agreement is attached to the replying affidavit in terms of which the respondent agreed to pay the petitioner in consideration for the release and covenant not to sue,
  - (i). Salary for the month of January, 2020 in the sum of .....Kshs 180,000
  - (ii) One-month salary in lieu of notice - Kshs 180,000
  - (iii) Salary back party ..... Kshs 150,000
  - (iv) Exparte pay equivalent to three Months' Salary .....Kshs 540,000
  - (v) Legal fees ..... Kshs 90,000
17. The petitioner acknowledged that the payment of the aforesaid sums was subject to his strict compliance with the terms of the Agreement, and that the Petitioner "releases and acquits and forever discharges Fuzu from any and all past, present or future claims, demands, obligations, actions, causes of actions, right, damages cost expressly and compensation of any nature whatsoever...."
18. The petitioner signed the Agreement on 30<sup>th</sup> January, 2020 which was witnessed by his advocate Steve Opar and Nelly Mutula, signed on behalf of the respondent in the same vein and witnessed thereto by the Advocates for the respondent.
19. The respondent consequently denies all the particulars of the petition as set out in the petition and all the particulars of breach, of the contract of employment; violation of the Employment Act, 2007, and provisions of the Constitution as alleged by the petitioner or at all and puts the petitioner to strict proof.
20. The respondent has set out in detail under paragraphs 30 to 56, the lawful procedure it followed in putting in place the Performance Improvement Programme for the Petitioner and that it did not violate Section 41 and 45 of the Employment Act, nor did it violate Articles 41, 47 and 50(1) of the Constitution as alleged or at all.
21. That in any event, the dispute was settled lawfully and in terms of the law and the Court lacked jurisdiction to vitiate the settlement agreement since no reason, known in law for voiding a contract has been established by the petitioner in this petition.
22. That no constitutional issues have been set out with precision in this matter which is a pure contractual matter between parties which ought not to be brought to Court by way of a Constitutional petition.



## Determination

23. The parties filed written submissions and list of authorities which the Court has carefully considered together with the depositions before Court and the issues for determination are: -
- (i) Whether this dispute was lawfully settled by the parties.
  - (ii) Whether the petition raises with precision specific constitutional issues for determination as opposed to a mundane Employment and Labour dispute.
  - (iii) Whether the petitioner is entitled to the reliefs sought.
24. The respondent terminated the employment of the petitioner for poor work performance on 17<sup>th</sup> January, 2020 and upon receipt of a demand notice from the advocates for the petitioner, the respondent engaged its own advocates with instructions to explore an out of Court settlement with the petitioner.
25. It is not in dispute that the advocates for the parties engaged in negotiations which culminated in execution of a Settlement and Release Agreement dated 30<sup>th</sup> January, 2020.
26. It is not in dispute that the parties executed the agreement in the presence of their advocates. It is also not in dispute that the petitioner duly received payment in terms of the agreement in consideration of absolute release of the respondent from any liability arising from the employment relationship between the parties.
27. In the petition itself the petitioner did not deny having signed the settlement agreement nor has he specifically outlined grounds known in the law of contract for voiding a contract entered into by parties.
28. In Civil Appeal Case – *Coastal Bottlers Limited v Kimathi Mithika* [2018] eKLR, the Court of Appeal had this to say: -

“In our mind, it is clear that the parties had agreed that payment of the amount stated in the settlement agreement would absolve the appellant from any further claims under the contract of employment and even in relation to the respondent’s termination. It is instructive to note that the respondent never denied signing the said agreement or questioned the veracity of the agreement. Further, from the record, we do not discern any misrepresentation on the import of the said agreement or incapacity on the respondent’s part at the time he executed the same. It did not matter that the amount thereunder would be deemed as inadequate. As it stood, the agreement was a binding contract between the parties..... All the ELRC was required to do was to give effect to the intention of the parties as discerned from the settlement agreement..... ‘Absent statutory or common law restrictions, the general principle of the English law of contract is [that parties to a contract are free to determine for themselves what obligations they will accept]. The parties have the freedom to agree whatever terms they choose to undertake, and can do so in a document, by way of mouth or by conduct. Giving effect to the parties’ intention meant that the ELRC could not entertain the suit filed by the respondent. This is because the respondent had waived his rights to make any further claim in relation to his Relationship with the appellant. Having expressed ourselves as herein above, we see no reason to delve into the other grounds of appeal. In the end, we find that the appeal has merit and is hereby allowed with costs. We set aside the judgment.



This case is in all fours with the present petition and we see no reason to delve into the merits of the petition.

- 29 As was stated in the case of *Southern Engineering Company (SECO) v David Anzani Ombeba* [2015] eKLR,

“Thus, there was no justification for the intervention of the Court in a matter where the parties had freely agreed. That was the essence of the conciliation process, and a precedent allowing the Court to ignore such an agreement would put a damper on the conciliation process protected in resolution of labour disputes.

30. In the present case, there cannot be any justification discerned from the petition or otherwise for the Court to intervene in this dispute, resolved freely, voluntarily and under the watch of the advocates for the parties as duly observed from the parties Agreement out of Court.
31. Indeed, this petition is an abuse of the Court process and it raises no triable legal and or constitutional issues arising from the employment contract between the parties which was amicably ended by a release agreement by the parties. See the case of *George Okoth v Hui Yi Company Limited* [2018] eKLR.
32. Accordingly, and in answer to issues (a), (b) and (c) above, the petition lacks any merit and is dismissed.
33. In consideration of the employment relationship between the parties that ended amicably, each party to bear their own costs of the suit.

**DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 28<sup>TH</sup> DAY OF JULY, 2022.**

**MATHEWS N. NDUMA**

**JUDGE**

**Appearances**

Mr. Omollo for the petitioner

Mr. Achoki for respondent

Ekale – Court Assistant

